

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHRISTOPHER HART, et al.,

Plaintiffs,

-vs-

13-CV-6458

CRAB ADDISON, INC.,
d/b/a JOE'S CRAB SHACK, et al.,

Defendants.

Proceedings held before the
Honorable Marian W. Payson, Kenneth B.
Keating Courthouse, 100 State Street,
Rochester, New York, on October 19,
2017.

APPEARANCES:

JESSICA L. LUKASIEWICZ, ESQ.,
Appearing for Plaintiffs.

BRIAN JEFFREY GERSHENGORN, ESQ.,
MELISSA JILL OSIPOFF, ESQ.,
Appearing for Defendants.

AUDIO RECORDER: Kathy J. Allen

TRANSCRIBER: Michelle L. McLaughlin, RPR,
Court Reporter,
716/332-3560

(Proceedings recorded by electronic sound
recording, transcript produced by computer.)

1 THE COURT: Good afternoon. Please be
2 seated.

3 THE CLERK: Christopher Hart, et al,
4 versus Crab Addison, 15-CV-6458.

5 THE COURT: Would counsel like to note
6 their appearances for the record, please?

7 MS. LUKASIEWICZ: Good morning, your
8 Honor. Jessica Lukasiewicz from Thomas and Solomon
9 for the plaintiffs.

10 THE COURT: Good afternoon.

11 MR. GERSHENGORN: Good afternoon, your
12 Honor. Brian Gershengorn, Melissa Ossipoff from
13 Fisher Phillips for defendants.

14 THE COURT: Okay. Good afternoon. Who's
15 going to be arguing today?

16 You are, Mr. Gershengorn?

17 MR. GERSHENGORN: Yes, your Honor.

18 THE COURT: Okay. In the event that you
19 do not get the relief that you're looking for here
20 and that you have to make another trip to Rochester
21 at some point on this case, I encourage you to take
22 a look at a new policy that's been adopted by
23 couple of judges in our court after New York State
24 report -- you may have seen it -- about women
25 litigators and opportunities afforded to women in

1 the courtroom. And at this point a couple of
2 judges -- maybe it will be more over the next
3 several months -- have adopted a policy. I think
4 it's framed as a junior lawyer policy to encourage
5 junior lawyers, not just women junior lawyers, but
6 junior lawyers to have more opportunities in court.
7 One of the things that the policy acknowledges is
8 that -- or at least implicitly acknowledges is it's
9 sometimes hard to get a client to agree to that,
10 and so the -- if one wishes to proceed that way,
11 we're open to supplementing the record, you know,
12 after the oral argument, you know, by the more
13 senior attorney, if that's something that counsel
14 is interested in doing. So take a look at that.

15 I'm assuming that Miss Osipoff is more junior
16 than you, Mr. Gershengorn. I think that's true. I
17 don't know that definitively, and certainly we've
18 had an awful lot of litigation surrounding an
19 issue, and I expected to hear from Miss Osipoff on
20 the witness stand, but I'm not sure that I've heard
21 Miss Osipoff as counsel on any motions. At least I
22 can't remember that. So, just encourage you to
23 think about that opportunity in the future if you
24 have to come back here. Okay.

25 MR. GERSHENGORN: Thank you.

1 THE COURT: All right. So, with respect
2 to the procedural posture of the case, since
3 everybody was in court last on this matter what has
4 happened is that the corporate defendants have
5 filed for bankruptcy protection under Chapter 11.
6 I think that's pending somewhere in Texas, if I'm
7 not mistaken. And the plaintiffs here, in addition
8 to having sued those corporate defendants, has also
9 sued three individual defendants. Mr. Gershengorn
10 and Miss Osipoff and their firm is counsel -- to
11 date is counsel both for the corporate defendants
12 and for the individual defendants.

13 This Court acknowledges and recognizes that the
14 automatic bankruptcy stay is in effect with respect
15 to any further proceedings pertaining to the
16 corporate defendants. That automatic stay does not
17 by its terms extend to the individual defendants.

18 Since the filing of the bankruptcy petition,
19 the firm of Fisher Phillips has moved this Court
20 for permission to withdraw as counsel for the
21 individual defendants. They have done that as our
22 local rules permit by submitting to me an affidavit
23 and memo of law in camera, which I have considered.
24 The plaintiffs oppose that application, and do so
25 on certain assumptions that they make because they

1 don't have access to what the in camera filings
2 were. So they're -- they're making certain
3 assumptions which may or may not be correct. And a
4 reply letter was submitted -- and was that in
5 camera as well, the reply letter?

6 MR. GERSHENGORN: We submitted part of
7 it --

8 THE COURT: That's right. I did take a
9 look at that. Okay. So, I have a lot of
10 questions. Quite a number of them are factual
11 questions. You're welcome to stay at the table if
12 you like. You've got a big notebook there. I
13 don't know whether I'm going to be asking any
14 questions about anything that you need to look at
15 in the notebook. Whatever you're comfortable doing
16 is fine.

17 MR. GERSHENGORN: I'm fine at counsel
18 table.

19 THE COURT: Okay.

20 MR. GERSHENGORN: If that's okay.

21 THE COURT: So just pull the base of the
22 microphone, and you can sit if you like or stand,
23 as you wish.

24 MR. GERSHENGORN: Thank you.

25 THE COURT: All right. So, let me ask

1 just a couple updating questions first. The three
2 individual defendants -- and just again so -- so
3 we're clear on this, at this stage you are still
4 counsel to them, because you would have to get
5 permission from the Court to withdraw, and that
6 hasn't been granted. So to the extent that your
7 papers may include some kind of disclaimer that the
8 papers are being submitted on their behalf, that's
9 not permitted and you are counsel for those
10 individual defendants.

11 But tell me what is their position with respect
12 to this application, and what -- what's the status
13 of their retaining new counsel to represent them?

14 MR. GERSHENGORN: Thank you, your Honor.
15 I guess the latter part of your question first, it
16 was news to us when we saw in plaintiffs' counsel's
17 opposition that the three individual defendants
18 were represented by Seyfarth Shaw. We had not
19 known that to be true. We have since learned that
20 is not true. So as far as we've been told, they
21 have not retained new counsel, Seyfarth or anybody
22 else to our knowledge, your Honor.

23 THE COURT: Okay. So, they're aware of
24 your application?

25 MR. GERSHENGORN: They're aware of our

1 application. Pursuant to the rule and your Honor's
2 directive, we have provided them with
3 documentation.

4 THE COURT: What is their position on it?

5 MR. GERSHENGORN: They have no position
6 that we're aware of, your Honor.

7 THE COURT: All right. I mean, have
8 you -- have you talked to them about whether their
9 view is that they would like you to continue
10 representing them, whether they would like to be
11 represented by other counsel?

12 MR. GERSHENGORN: I guess without
13 divulging any attorney-client communication, there
14 has been no substantive dialogue.

15 THE COURT: Okay. So, I'm going to assume
16 from that that the individual defendants -- that
17 we're not in a situation where, you know, if they
18 were here, they'd say we join in the application,
19 and we have counsel so and so is ready to take on
20 the representation.

21 MR. GERSHENGORN: That's certainly
22 correct.

23 THE COURT: Okay. Now -- all right.
24 Let's switch to another question. What is
25 happening in the bankruptcy matter? I couldn't

1 actually find any docket sheet that pertained to
2 that bankruptcy. I'm not sure why I couldn't find
3 that, but I -- I searched for it by Ignite
4 Restaurant and Crab Addison and certain things, and
5 I came up with a lot of cases, but I didn't come up
6 with a bankruptcy case.

7 MR. GERSHENGORN: Well, I'm happy to
8 provide the Court. I think we have -- we've seen a
9 copy of the docket, your Honor. We can provide
10 that if the Court wanted. As best as I recall, I
11 believe the -- the date for the bankruptcy, I'll
12 call it closing, wrap up, finality is for late
13 November. I think November 27th. Around
14 November 27th, your Honor.

15 THE COURT: Okay.

16 MR. GERSHENGORN: And so I think it's
17 winding its way through bankruptcy court as a case
18 normally would.

19 THE COURT: And what is the status with
20 respect to -- or what attention has been given by
21 the bankruptcy proceeding to this particular
22 litigation?

23 MR. GERSHENGORN: So, I'm not privy to
24 those conversations. I do know that conversations
25 have or are taking place with plaintiffs' counsel.

1 I think they might be able to shed more light on
2 the details --

3 THE COURT: Okay.

4 MR. GERSHENGORN: -- of those
5 conversations.

6 THE COURT: Okay.

7 MR. GERSHENGORN: My only understanding,
8 your Honor, is that there is a dialogue.

9 THE COURT: Okay. Presumably the
10 plaintiffs have claims in that bankruptcy
11 proceeding.

12 MR. GERSHENGORN: That's my understanding.

13 THE COURT: Okay. I do want that
14 information. Let me just ask one more question to
15 Mr. Gershengorn. All right.

16 Now, with respect to the individual defendants
17 and the question of indemnification, what -- what
18 have they done to identify themselves in the
19 bankruptcy proceedings as parties that may someday
20 have an indemnification claim against the bankrupt
21 company?

22 MR. GERSHENGORN: So, your Honor, I
23 believe as part of the bankruptcy filings -- it's a
24 matter of public record -- they have each
25 individually filed claims in the bankruptcy case on

1 those -- well, on the basis of indemnification.

2 THE COURT: Okay. And is there some
3 documentation that shows that?

4 MR. GERSHENGORN: Yes, there is, your
5 Honor.

6 THE COURT: Okay. And if I could just
7 take a look at that?

8 MR. GERSHENGORN: Yeah. Can I approach?

9 THE COURT: Yes, please.

10 MR. GERSHENGORN: It's rather thick, but I
11 think it's because the complaint -- it's really the
12 first couple pages.

13 THE COURT: Okay. Thanks.

14 MR. GERSHENGORN: Those are for all three
15 of them.

16 THE COURT: Um-hum. Okay. So I've been
17 handed a proof of claim -- copy of a proof of claim
18 form. I'm not going to go through all of them. I
19 assume they're similar, if not identical. The one
20 as to Mr. Morris appears to have been executed on
21 September 1st. In answer to the question how much
22 is the claim, the answer is contingent and
23 unliquidated based on indemnity. Similar language
24 is probably in the other ones.

25 Okay. Do you represent any parties in the

1 bankruptcy?

2 MR. GERSHENGORN: No, we do not, your
3 Honor.

4 THE COURT: Okay. Is your firm a creditor
5 in the bankruptcy?

6 MR. GERSHENGORN: We are, your Honor.

7 THE COURT: Are you identified as a
8 creditor?

9 MR. GERSHENGORN: Yes, we are.

10 THE COURT: Have you made a claim?

11 MR. GERSHENGORN: We have.

12 THE COURT: Okay. Okay.

13 Miss Lukasiewicz, why don't you tell me what
14 you know. And you just pull the microphone over to
15 you as well and you can remain seated. What's
16 going on as far as this litigation in the
17 bankruptcy as it pertains to the corporate
18 defendants?

19 MS. LUKASIEWICZ: First I would just say
20 sorry, I was reached out by an attorney on three
21 different occasions from Seyfarth indicating that
22 they were now -- he was now retained for the
23 individuals, so that was the point.

24 THE COURT: Okay. And your last
25 communication with that attorney was when?

1 MS. LUKASIEWICZ: Say approximately three
2 weeks ago via email, but I could be off on that
3 exact date. Somewhere around then.

4 THE COURT: Okay.

5 MS. LUKASIEWICZ: But in terms of this
6 action as it relates to the bankruptcy proceedings,
7 we have filed a class proof of claim as well as
8 individuals from this action. I believe for
9 approximately 300-plus have filed individual proofs
10 of claims as well. We also, as our law firm, have
11 filed a proof of claim. And so that is all going
12 through. There's -- the hearing for the class
13 proof of claim was actually supposed to be tomorrow
14 but got postponed. I think it's supposed to be
15 scheduled in November right now. So that's where
16 we are in terms of the process.

17 THE COURT: Okay. So, nothing -- nothing
18 more concrete than that at this stage?

19 MS. LUKASIEWICZ: Nothing more concrete
20 than that, your Honor.

21 THE COURT: Okay. Who is the attorney
22 from Seyfarth Shaw who you've been in touch with?
23 Or do you not have that?

24 MS. LUKASIEWICZ: It's an individual from
25 Illinois, from Chicago, and it's a gentleman. I

1 don't remember his name offhand.

2 THE COURT: But you have some notes
3 somewhere?

4 MS. LUKASIEWICZ: Yes, I do.

5 THE COURT: Okay. All right. Okay. I
6 have reached out to counsel for defendants to
7 obtain copies of some documents which were
8 referenced in their papers. I don't think this
9 is -- I don't think should be any big secret is
10 that these issues relate to issues of
11 indemnification. And I asked for copies of the
12 engagement letters that the individual defendants
13 had signed. I was provided those engagement
14 letters. They are with prior counsel, Epstein --

15 MR. GERSHENGORN: Becker and Green.

16 THE COURT: Becker. I'm assuming that
17 either -- that there are no engagement letters
18 either for Ogletree or for Fisher Phillips, is that
19 right?

20 MR. GERSHENGORN: That's correct, your
21 Honor.

22 THE COURT: Okay. All right. And I asked
23 for copies of indemnification agreements. I did
24 want to ask about that. I got an indemnification
25 agreement for two of the individual defendants, but

1 not for Morris. And I don't know if that was an
2 oversight. Is there -- is there an indemnification
3 agreement for Mr. Morris?

4 MR. GERSHENGORN: We have not gotten one,
5 your Honor. That was simply all we had.

6 THE COURT: Okay. And your -- I assume by
7 your hesitation that you don't feel comfortable
8 making a representation as to whether one exists or
9 doesn't exist?

10 MR. GERSHENGORN: We had asked the
11 follow-up. I haven't gotten a concrete answer to
12 that question. But we did ask for all three, your
13 Honor, and we provided the Court with what we got.

14 THE COURT: I'm assuming -- and tell me if
15 my assumption is wrong, I'm assuming that there's a
16 DNO policy?

17 MR. GERSHENGORN: I assume that to be
18 correct as well, your Honor. I don't know, if that
19 is true, what that policy looks like. We have not
20 been privy to it.

21 THE COURT: You know, I've read at least
22 one case where the issue of policy limits on a DNO
23 policy were relevant to issues that, in my view,
24 are properly before the Court now. I mean, that is
25 are the policy limits of the DNO policy sufficient

1 that any indemnification claim would be taken care
2 of under the policy? I mean, those -- that's a
3 consideration that I think has relevance here. You
4 don't -- you don't have any information as to the
5 terms of any DNO policy or the coverage limits?

6 MR. GERSHENGORN: I don't, your Honor.

7 The only -- the only conversation we had around if
8 there was a DNO was that it would not be
9 applicable. I have not seen it. I can't talk to
10 it specifically.

11 THE COURT: Why wouldn't it be applicable?

12 MR. GERSHENGORN: I don't know.

13 THE COURT: Okay. I mean, that seems
14 strange to me. Okay. So, let's talk about the --
15 your claimed conflict here. You told me in pretty
16 short motion papers that the claimed conflict is
17 between the debtor defendant, the company and the
18 individual defendants, quote, as a result of the
19 debtor defendants filing for bankruptcy. So help
20 me understand why is that a conflict? How is it a
21 conflict? Is it a conflict that exists now? How
22 would that conflict affect your ability to
23 represent both sets of defendants consistent with
24 your ethical obligations?

25 MR. GERSHENGORN: The conflict, your

1 Honor, as we see it, is one under 1.6 and 1.7 of
2 the Professional Responsibility Rules where we're
3 required to raise the issue with the Court. It's
4 based on the proof of claims. The individual
5 defendants are ostensibly making a claim for
6 indemnification. The debtor defendants were taking
7 a different position. Those are not two positions
8 that could be --

9 THE COURT: How are they taking a
10 different position? I mean, the debtor defendants,
11 as I understand it, to date at least have paid the
12 attorneys' fees on behalf of the individual
13 defendants. Right? I mean to --

14 MR. GERSHENGORN: To the extent.

15 THE COURT: I mean, to the extent that
16 they've paid attorneys' fees. They haven't said,
17 you know, we're disclaiming and we're not going to
18 pay their attorneys' fees.

19 MR. GERSHENGORN: That's correct.

20 THE COURT: Okay. So how does in this
21 litigation -- you don't represent anybody in the
22 bankruptcy. But in this litigation how does a --
23 give me a scenario under which you would have
24 divided loyalties as a result of a -- I don't know
25 if the right word is inchoate claim. They have

1 documented their claim for indemnification, but
2 that claim is no different -- it's not a different
3 fact than existed when you represented both the
4 bankrupt company and the individual defendants, you
5 know, whenever you got into the case. They've
6 always had a claim for indemnification. So what's
7 different?

8 MR. GERSHENGORN: Well, they've asserted
9 the claim now vis-a-vis the bankruptcy filing, and
10 as we currently sit here --

11 THE COURT: But, I mean, they asserted
12 their claim to some degree by requesting the
13 company to pay their attorneys' fees all along.
14 So, I mean, they've been relying on those
15 provisions for indemnification of, you know -- I
16 recognize there are -- there's the payment of
17 attorneys' fees and the payment of any judgment if
18 it could conceivably be entered. But they're
19 acting under that -- that indemnification agreement
20 and have been since the beginning of the case by
21 asking the company to pay their attorneys' fees,
22 right?

23 MR. GERSHENGORN: Yes, but now the
24 company's not, and the company can no longer
25 continue to pay the fees. So --

1 THE COURT: So what does that do to you
2 here? Okay. So they're going to duke that out in
3 the bankruptcy proceeding. It seems to me that it
4 is in every bit as much in the company's interest
5 now as it always has been that the individual
6 defendants vigorously defend against these claims.
7 How do they have divergent interests here?

8 MR. GERSHENGORN: The -- the diversion
9 interest is that they have a different take, your
10 Honor, on if there is ever to be liability
11 potentially in this matter, where that liability
12 holds. And so the -- and that's an issue that
13 could have arose at any particular point in time in
14 the litigation. It seems to be an issue now in
15 light of the debtor defendants being in bankruptcy.
16 But --

17 THE COURT: You haven't come to me and
18 said something has arisen factually or we've
19 developed information that causes us to believe
20 that we have a conflict, in which case the company
21 would still have the same obligations if ultimately
22 it were determined that the defendant should be
23 indemnified, but maybe they would be represented by
24 new counsel. But I think the company would still
25 be required to pay new counsel fees apart from

1 the -- from the bankruptcy issue. But that -- I
2 mean, that isn't what you've said.

3 You've said, it seems to me very clearly and
4 starkly in your papers, the conflict is because
5 there is a claim for indemnification in the
6 bankruptcy proceeding. And you cited a case which
7 is factually quite different from this case, and
8 I'll get to that in a minute. And, you know,
9 frankly, my view was okay, this situation arises
10 all the time. Your position that, you know, once
11 there is a bankruptcy and possibly a claim for
12 indemnification by individual defendants against a
13 bankrupt company, that is an actual conflict that
14 mandates withdrawal under the professional rules.

15 You know, my -- my reaction was, number one,
16 somewhat surprised, because I didn't necessarily
17 see that, but then secondly, okay, I'm going to go
18 to the cases and I'm going to find many examples
19 where courts have acknowledged such a conflict and
20 have permitted withdrawal of counsel. And I think
21 that I said to you in an earlier telephone
22 conference -- said to whoever was participating in
23 that conference that I thought the issue was going
24 to be an issue of a stay, whether there should be a
25 stay on behalf of the individual defendants. And

1 that individual defendants' counsel would probably
2 seek a stay, and the plaintiffs would probably not
3 seek a stay, and that's what we would be arguing
4 about. And that seemed to me what we should be
5 arguing about.

6 And so, you know, I certainly read the one
7 case, Mr. Gershengorn, that you cited. And, you
8 know, it's -- it's legally different because it
9 arises in the context of a bankruptcy where the
10 lawyer was the lawyer for the bankrupt company, and
11 there is a rule under the bankruptcy law that the
12 lawyer has to be disinterested. So, it was a
13 question of what that means under the bankruptcy
14 code. But I think, you know, apart -- so I would
15 say that it's -- you know, it is a different
16 legal -- legal question and factual scenario,
17 because the Fisher Phillips firm isn't representing
18 anybody in the bankruptcy. But more importantly,
19 the case -- the facts were -- were very different,
20 at least as I understand the facts are here.

21 In that case the individual defendant had
22 agreed to contribute a certain sum of money to the
23 debtor company in the bankruptcy proceeding. And
24 then -- and there had been litigation that had gone
25 on for some period of time before that. And then

1 the court says -- and this is page 675 of TWI
2 International versus Vanguard Oil and Service
3 Company, 162 Bankruptcy Reporter, and it's -- 162
4 Bankruptcy Reporter, and at 672, Southern District
5 of New York, 1994. And on page 675 the court notes
6 thereafter Butler agreed to contribute a certain
7 sum of money to Vanguard in bankruptcy proceeding.
8 After the time that Butler agreed to make this
9 contribution, Mr. Simpson's representation of him
10 in any action would have been and would be
11 inappropriate. Specifically, Mr. Simpson's
12 representation of Butler could put him in a stance
13 of advocating a position that would decrease the
14 value of the bankruptcy estate. For example, if
15 Mr. Simpson were to negotiate a settlement in the
16 instant case -- which would be analogous to this
17 case -- in which his client agreed to make payments
18 to TWI -- the bankrupt company -- Butler possibly
19 would be unable to make his contribution to the
20 bankruptcy estate. In such a case, Mr. Simpson
21 would be asserting a, quote, economic interest that
22 would lessen the value of the bankruptcy estate,
23 and thus, would not be disinterested -- again, as
24 defined in the bankruptcy code. In sum, the court
25 concludes that there is a, quote, potential actual

1 conflict if Mr. Simpson were to represent Butler in
2 this action.

3 And that's the one case that is cited by
4 defendants in support of their application for
5 permission to withdraw. I -- that case, seems to
6 me, a far cry from support for the basic
7 proposition that when you have a corporate
8 defendant and you have individual defendants who
9 are officers or employees of that corporation, and
10 they're all in litigation together and they're all
11 represented by the same lawyer, if the company
12 files for bankruptcy and there is an issue of
13 possible indemnification, that counsel has to get
14 out of the case.

15 And, you know, to -- there could be a lot of
16 lawyers who are wrong, but my question -- I wanted
17 to know if I deny the motion for counsel and the
18 issue of a stay is litigated, what is the law on
19 that -- on that issue? And, you know, there are a
20 lot of cases out there that are -- that are very
21 helpful. I think parsing them I can draw some --
22 you know, some conclusions, and there are generally
23 some -- some rules that the Court acknowledges,
24 although I will say that, you know, they -- some
25 courts come out one way and some courts come out

1 another way.

2 But what was interesting to me was the number
3 of these cases. And I went back and I said okay,
4 if it's so basic, I'm going to see that in the
5 docket sheet. And I went case-by-case, and the
6 majority of those cases in which the individual
7 defendant, the question of whether a stay, the
8 bankruptcy stay, should be extended to the
9 individual defendants, either by the bankruptcy law
10 or as a discretionary stay by the court that has
11 the other litigation, that many times that issue is
12 being litigated by the same lawyer. And, you know,
13 you see it in the front of the decision. You know,
14 I wanted to be sure that I wasn't overlooking
15 anything, and I went into the dockets for all these
16 cases, and I saw who the lawyers were, and I saw --
17 and they stayed in the case.

18 So, you know, it -- certainly I acknowledge,
19 Mr. Gershengorn, maybe you guys are the only
20 lawyers who seem to have found this issue. But the
21 one case you cited doesn't seem to me to stand
22 directly for the proposition, and I can find no
23 other case support. And I find a slew of cases
24 dealing with the issue that I think we should be
25 dealing with in which the same lawyer is

1 representing the bankrupt debtor and the individual
2 defendants. One of them, which was one that I only
3 saw today, is one that your firm had some
4 involvement in, although not initially, and that's
5 an FLSA case against Dunkin' Donuts and Baskin
6 Robbins, FPSDA, LLC. I'm sure you're familiar with
7 it. Eastern District of New York,
8 Bankruptcy, 2012.

9 And there's an interesting decision, long
10 decision, by the bankruptcy judge in 2012. And the
11 cite is 2012 Westlaw 6681794, December 26th, 2012,
12 ultimately declining to extend the stay to the
13 individual defendants, and addressing, you know,
14 questions of indemnification claims, are they
15 administrative claims? Are they general unsecured
16 claims? Is there -- you know, by virtue of a
17 possible indemnification claim, does that
18 essentially put the debtor and the individual
19 defendants in such an identity of interests that it
20 would be unfair for the case to proceed against the
21 individual defendants if the company is the one
22 that is ultimately going to be on the hook for any
23 defendants? Anyway, it's a -- it's a very long and
24 I think helpful decision that discusses other
25 cases.

1 And, you know, in that case I went back to the
2 docket sheet, and there was a letter January 2012
3 by the firm of Ruskin, Moscou and Faltischek,
4 representing -- and the case had been filed, no
5 answers had been filed, and it was a letter from
6 that firm indicating the firm is counsel to CDDC
7 Acquisition Company, and some other companies,
8 three of the defendants in the above-referenced
9 action, you know, they filed for bankruptcy,
10 letting the court know.

11 And then subsequent to that the -- one of the
12 individual defendants who sought a stay was
13 represented by an attorney with that same firm,
14 and, Mr. Gershengorn, I think, you know, a year and
15 a half later you came in and took over for that --
16 that lawyer withdrew, and you represented the
17 individual defendant. I recognize that the matter
18 was stayed as to the company at that time, but at
19 least you came into a case where the same lawyer
20 seemed to be representing the company and the
21 individual defendant. And, you know, I want to
22 give you these cases, because I want you to look at
23 them.

24 I mean, the same is true in -- I'm going to
25 give you the cases. Texas -- no, I think it's --

1 Tenas, T-E-N-A-S, Tenas-Reynard against Palermo
2 Taxi, and that's 2016 Lexus 42423, Southern
3 District of New York, 2016. Good thoughtful
4 decision.

5 Le Metier, L-E-M-E-T-I-E-R, Beauty Investment
6 versus Metier Tribeca LLC, 2014 Lexus 136152,
7 Southern District of New York, 2014.

8 Here's an odd one, Lightbody versus Girlie's
9 Ambulette, and that's 2010 Lexus 88862, Eastern
10 District of New York, 2010.

11 Stanford versus Phonex, 2009 Lexus 32405,
12 Eastern District of Pennsylvania, 2009.

13 I certainly recognize that there is no
14 discussion of that issue in those cases, but, you
15 know, it's implicit in those cases that the
16 attorneys didn't seem to think that there certainly
17 was an actual conflict that mandated withdrawal,
18 and there's no indication in any of the decisions,
19 in any of the footnotes by any of the judges that
20 they were troubled by this and thought there was
21 a -- thought there was a conflict.

22 You know, I think that these cases, and, you
23 know, there are a number of them, but I think these
24 cases -- and the FLSA cases -- I found three FLSA
25 cases. The one I cited has an expansive,

1 thoughtful, helpful decision. The other two cases
2 go -- one goes one way and the other goes the other
3 way. And it's -- it's a pretty perfunctory,
4 cursory discussion, and I'll give you those -- one
5 second. Those cases are Peterson versus Avantair,
6 A-V-A-N-T-A-I-R, 2013 Westlaw 4506414, Middle
7 District of Florida, 2013. That court did grant a
8 quote, unquote discretionary stay.

9 And then the Lightbody versus Girlie's
10 Ambulette. In that case the court concluded the
11 individuals did not show that a stay was justified.

12 There are cases which deal with proceeding on
13 sanctions motions against individual defendants
14 rather than where the corporate defendant isn't in
15 bankruptcy. One of them is Roberts versus
16 Bennaceur, B-E-N-N-A-C-E-U-R, 2015 Westlaw,
17 1471889, District of Connecticut. Same attorneys
18 represented both parties.

19 So, I mean, to have a response to that, it
20 seems -- it seems -- it seems striking, and it
21 seems like, to me, as if your position is pretty
22 significantly undercut by the absence of any
23 authority out there.

24 MR. GERSHENGORN: I have two comments,
25 your Honor. First, I don't know, having not looked

1 at those cases, if they any of those deal with
2 issues where the debtor defendant is saying there
3 is no indemnification, not what the indemnification
4 looks like. And I think that's -- I think that's
5 where we're at here, which is the individual
6 defendants are saying they should be indemnified,
7 that's their proof of claim. The debtor defendant
8 is saying no, you're not indemnified. And so I'm
9 not sure if that is or is not at play in any of
10 those cases. But I think that that is one of the
11 things that's underlying the conflict here.

12 Second, conflict aside, the individual
13 defendants are not paying nor have they said they
14 can pay, and we cited a number of cases to the
15 Court in which it is permissible for counsel to
16 withdraw.

17 THE COURT: Yeah, but I'm not interested
18 in leaving these people with no counsel. They have
19 an agreement with -- they had an engagement
20 letters. Those engagement letters obligate their
21 lawyers, who at the moment are you, to assist them
22 in finding counsel. That's an affirmative
23 obligation, and I haven't heard about what's been
24 done to assist them in finding counsel. And I
25 don't see that -- so, you know, I let you out

1 because they have no ability to pay you. Well, if
2 they have no ability to pay you, presumably they
3 have no ability to pay anybody else either, and
4 they're the ones who are going to be left without
5 counsel. And my reaction is, you know, is that --
6 you know, is that fair to them? I don't -- it
7 seems unfair to them. It seems to me that maybe
8 the decision ought to be made to withdraw from
9 representing the company as to which the
10 proceedings are going to be stayed and continue
11 representing the individual defendants. And I
12 recognize that your ability to ultimately recover
13 attorneys' fees there may be contingent. I'm not
14 sure its a nullity, but it may be contingent. But
15 there are a lot of cases in which a request to get
16 out of representation because of nonpayment of fees
17 isn't granted under extenuating circumstances.

18 You know, as to the -- as to the first issue,
19 you know, I guess that -- that argument concerns
20 me. I think if what you're saying is that the
21 company believes that there is a divergence in
22 their interests, they're not entitled to
23 indemnification. I presume that they would have to
24 say, I've read the documents. They're not entitled
25 to indemnification because we, as a company, are

1 saying they didn't act in good faith, and they
2 didn't act in what they believe to be the best
3 interest of the corporation, because the
4 indemnification provisions here are I think about
5 as broad as one can get under the law. And they're
6 pretty similar to every one of these cases I've
7 read that have dealt with indemnification
8 provisions and quote the language. And it seems to
9 me that, first of all, the fact that you have
10 litigated to date representing both of them and the
11 company has paid their fees, to me, has to stand as
12 a representation that as of last time you were in
13 court before the bankruptcy was filed, there was --
14 you didn't perceive any conflict.

15 So, the fact that they filed for bankruptcy has
16 nothing to do with whether they're entitled to
17 indemnification or not. I mean, just the simple
18 fact that they filed for bankruptcy is nothing to
19 do with whether they're entitled to
20 indemnification. Indemnification by its terms
21 turns on their good faith and whatever the language
22 is, believe that their actions were taken in the
23 interest of the corporation.

24 So, if they're facts that the company is saying
25 well, gosh, we now know facts that makes us think

1 that they weren't acting in good faith or in our
2 best interests, then those facts should have been
3 brought to the Court whenever they arose, and they
4 should not have been represented by same counsel.

5 But they weren't. I mean, what's been brought
6 to the Court's attention is that the company filed
7 for bankruptcy. And I don't know see how the fact
8 that the company -- you know, and I don't think you
9 can just come in here and say the company says
10 they're not entitled to indemnification. On what
11 grounds?

12 MR. GERSHENGORN: Well, I would tell the
13 Court I am certainly not aware of any of those
14 conversations in regards to conduct or behavior.
15 And without delving into any attorney-client
16 communications, the debtor defendant has certainly
17 taken the position that the individual defendants
18 are not indemnified. Presumably that's why the
19 proof of claim was filed.

20 I think to the extent the Court would want
21 anything additional on that, I would be more than
22 happy to let the debtor defendants know that they
23 should submit something.

24 THE COURT: Well, I guess, I'm not trying
25 to be, you know, hostile or antagonistic to you.

1 This is a genuine ethical question. You are
2 representing both of them. Don't you have an
3 obligation once you come to court and tell me the
4 company is telling me there's no basis for
5 indemnification, you know, there's no secret here.
6 The indemnification language is the same
7 indemnification language you find all across the
8 country in situations like this. It's good faith,
9 and, you know, whatever the other prong is,
10 reasonable belief.

11 You know, it would seem to me that you are
12 representing the individual defendants right now.
13 You hear from the company, you know, somebody from
14 the company we don't have an obligation to
15 indemnify. You ought to be saying what do you
16 mean? I've been representing both entities, you
17 know, the individual and the company. You know,
18 what do you mean that they're not entitled to
19 indemnification? You know, you've been
20 representing both of them on the -- on the -- I
21 assume with the belief that there were no divergent
22 interests.

23 So, I am surprised to hear you come to court
24 and say I don't know what that's based on. I think
25 you have an obligation to find out what's that

1 based on.

2 MR. GERSHENGORN: And I -- I understand
3 what the Court is saying. And I believe as counsel
4 along with Miss Osipoff, therein lies the conflict.
5 I can't speak anymore to those dialogues. I think
6 that that's why we submitted the papers in camera
7 and --

8 THE COURT: But your papers in camera
9 didn't say anything other than they filed for
10 bankruptcy, see TWI International, there's a
11 conflict. You know, I'm not granting you relief on
12 that basis. I don't think that that decision
13 stands for that, and all these other cases counsel
14 do exactly what I expected you to do here, which is
15 to stay it on behalf of the individual defendants.
16 I mean, you can argue with me about -- take the
17 position that, you know, we're not getting paid, we
18 should be allowed to get out. You know, that's an
19 issue that I may or may not agree with you, and I
20 may keep you in for awhile and let you out down the
21 road. There are different ways to deal with that.

22 But, you know, your papers didn't say anything
23 about this, you know, factual issue that I think
24 you're saying makes this case different from all
25 those other cases. You simply made an argument

1 that seems to me would apply to any other situation
2 when, you know, you have this common scenario. And
3 people aren't getting out under those typical
4 situations.

5 MR. GERSHENGORN: Factually I understand
6 what the Court is saying. I'm not sure -- I'd have
7 to look at those cases. I understand what the
8 Court's saying. When the issue did first arise,
9 your Honor, the individual defendants asked us, and
10 I believe we were on a telephone conversation, to
11 request a stay pending the bankruptcy. That was
12 not the road that we ended up going down. I don't
13 recall sitting here exactly why we were not going
14 to move the Court or follow down a road of a stay.
15 But that was certainly something that we had
16 initially raised.

17 We're not opposed to a stay. I mean, part of
18 what we -- as representatives and still
19 representatives of the individual defendants, I
20 should state for the record again, they do want a
21 stay. They don't want to proceed while the
22 bankruptcy issue --

23 THE COURT: All right. So if I made you
24 stay in the case, if I denied your motion -- and I
25 am denying it on the basis of what's been submitted

1 to date. I don't find that the papers that have
2 been submitted to date justify the relief that is
3 sought. Okay. So, it seems to me that -- so you
4 know, if you're in the case you're telling me that
5 what you would do is make a motion for a stay on
6 behalf of the individual defendants.

7 MR. GERSHENGORN: That would be correct,
8 your Honor.

9 THE COURT: Okay. So I think what you --
10 what you need to sort out now is to figure out
11 whether you see any ethical constraints in the
12 making a motion for a stay. And I don't want to
13 suggest at all, you know, any prejudging the merits
14 of that. I think there are a lot of very
15 thoughtful decisions, and as I said, there are
16 some -- some, you know, common threads that you can
17 cull from the decisions. But sometimes you say oh,
18 I think this judge saw it this way and a different
19 judge reached a different conclusion on pretty
20 similar considerations. So, it's not an easy
21 determination. But, I think you need to -- you
22 need to look at that.

23 Now, you know, I didn't anticipate that you
24 were going to come in and tell me the company
25 thinks they're not entitled to indemnification. I

1 assumed they made a claim for indemnification
2 because that's the safe thing to do. And, you
3 know, in bankruptcy, you're supposed to come in if
4 you possibly have a claim. So, I did not read that
5 as any reflection that the company thought that
6 they were not entitled to indemnification. And as
7 I said, I've assumed that the company to date has
8 acted as if they're presumptively entitled to -- to
9 indemnification.

10 And many -- most of these stay cases that I've
11 cited deal with questions of indemnifications, and,
12 you know, the black letter law is where there's
13 automatic indemnification by contract, which is
14 pretty hard to find automatic indemnification by
15 contract, because I think by law you can't really
16 have automatic indemnification. But that taxi
17 case, which is the Palermo taxi case, that was a
18 case where under the New York Vehicle and Traffic
19 Law, if a taxi driver is found to have commit -- I
20 don't know, engaged in negligent conduct, it's
21 imputed to the taxi company. So there the judge
22 said that is -- they're essentially identical in
23 interests there. There is an identity in interest
24 there by virtue of operation of law that the
25 conduct of one is going to be imputed to the

1 conduct of the company.

2 So there's a lot of analysis of questions of
3 indemnification, and I don't know, Mr. Gershengorn,
4 about whether, you know, after you have further
5 questions with whoever you need to have further
6 conversations with, you know, you are going to
7 believe that you are able, as so many other counsel
8 in similar situations have done, make a motion for
9 a stay, and at least represent them until we can
10 get that determination issued, or whether because
11 the stay issue may be bound up with indemnification
12 issues.

13 But, you know, if the position is that there is
14 a question of indemnification, I am likely to have
15 a lot of questions about how is it that it's
16 arising now. I don't understand that. I'm
17 skeptical about what could have happened between
18 the day before bankruptcy and the day after
19 bankruptcy that all of a sudden created some real
20 issue about indemnification that didn't exist the
21 day before. I'm skeptical of that. I think it
22 raises some real questions.

23 So, I am -- I'm not getting into the question
24 of the sanctions motion. I will -- I know I will
25 prejudge that in the sense of saying I think it is

1 very unlikely that I would agree with plaintiffs
2 that the Court has jurisdiction to go forward
3 against the company on a sanctions motion. To me
4 that's pretty clear.

5 You've got some cases that you've cited. I
6 think that there are cases that -- more cases have
7 disavowed the reasoning of -- I think some of them
8 the reasoning is a little different. It's a
9 contempt motion. Your motion seeks sanctions, you
10 know, of a different variety than -- contempt is a
11 sanction that is coercive in nature and if the
12 other party does what the other party is supposed
13 to do, the contempt can be lifted. And that was
14 the rational of at least some of these decisions.

15 But, you know, you're asking for striking the
16 answer, I don't know, but really serious sanctions
17 which could, in effect, I think result in liability
18 by the defendants and judgment for the plaintiffs.

19 So, if you want to continue to go down that
20 route, you can. But it's -- I have looked at those
21 cases, and if I were to rule today, I would not
22 rule in your favor on that. I'm not going forward
23 with the sanctions against the company.

24 MS. LUKASIEWICZ: Your Honor, may I speak?

25 THE COURT: Yes.

1 MS. LUKASIEWICZ: I understand that you've
2 looked at the cases. I mean, our respective -- at
3 least all of the cases cited by defendants
4 certainly were dealing with conduct that occurred
5 after the bankruptcy, which I think the cases at
6 least we cited occurred -- the conduct at question
7 occurred prior to bankruptcy. I understand that
8 you're saying it's a contempt issue. I think part
9 of it also is though if it's dealing with contempt
10 meaning something to kind of punish or deal with
11 egregious behavior, which I think is what we've
12 alleged in the sanctions motion, at least in part,
13 it does make sense to move forward.

14 I think even aside from that though, as we said
15 in our papers, we would think it makes sense to
16 still certainly even without debtor defendant be
17 able to move forward.

18 THE COURT: Yeah. No, I understand that's
19 your position.

20 MS. LUKASIEWICZ: Sure.

21 THE COURT: And you're certainly free to
22 argue anything that you want to --

23 MS. LUKASIEWICZ: Sure.

24 THE COURT: -- but I would say that, you
25 know, my reaction when you brought it up on the

1 phone was that, you know, that was -- that was a
2 big surprise to me. I've now read the cases. I
3 don't think that they make a lot of sense to me.
4 One of the cases acknowledges that the lead case
5 was decided under a prior provision of the
6 bankruptcy code and it's been revised since then.

7 So I'm not likely to find them persuasive. I
8 say that because I think in terms of going forward
9 in this case, you all ought to assume that I am
10 setting aside the issue of proceeding on the
11 sanctions motion against the company. My judgment
12 is that is stayed, and I don't intend to proceed on
13 that.

14 Proceeding against the individual defendants on
15 a sanctions motion is, you know, fair game to --
16 to -- for me to decide, as is just proceeding on
17 discovery, and, you know, whatever else needs to
18 happen against the individual defendants.

19 Is there any other questions or any other
20 comments?

21 MS. LUKASIEWICZ: I guess I just had one
22 comment. To the extent that under -- and I'm not
23 obviously bankruptcy counsel, but I do understand
24 obviously you can file in the bankruptcy
25 proceedings relief of the stay for a specific

1 purpose. Would that be something that your
2 court -- the Court would feel comfort in with
3 moving forward with the debtor defendant if that
4 was done to be able to deal with the sanctions
5 motion in that respect?

6 THE COURT: Well, a couple things. You
7 know, one of the questions is -- well, the
8 individual defendants may seek to have the stay
9 extended to them, and that issue arises, and I
10 think the cases I've cited will illustrate that
11 sometimes that motion is brought to the bankruptcy
12 court, and it is a motion that is sometimes
13 brought, as far as I can tell, by the bankrupt
14 company, by the estate, saying that, you know, you
15 should extend it to the individual defendants who
16 aren't debtors, because by allowing it to go
17 forward, it's going to have an adverse consequence
18 to the bankrupt estate. And so it's not -- it's
19 not an action brought by the individual defendants.
20 It's brought by the bankrupt estate. But the
21 argument is because we're the ones who are going to
22 end up, you know, being left holding the bag, we're
23 asking that the bankruptcy court extend the stay.

24 There are also cases in which the individual
25 defendants in the -- in the litigation that is at

1 issue make the application, like, for example, Mr.
2 Gershengorn can make the application here for a
3 discretionary stay. As far as I can tell, the
4 courts consider essentially the same -- the same
5 factors in making a determination. But I think
6 both the bankruptcy court and the district court
7 have some authority to say it wouldn't be
8 appropriate for the case to proceed or for certain
9 portion of the case. I don't know that it has to
10 be a stay as to everything.

11 And I think that you, as the plaintiffs, have
12 the right as far as I know -- I didn't look at this
13 issue, but this is my recollection of bankruptcy
14 law, I think you can go to the bankruptcy court and
15 ask for relief from the stay. I don't know how
16 likely it is that you would get it, but I think
17 that's -- so would I have comfort? I don't think
18 it's a question of comfort. I would say that I --
19 I feel as if any action against the company is
20 stayed by virtue of the automatic bankruptcy stay,
21 any action in this case, unless and until you
22 obtain an order granting relief from that stay.
23 So, the fact that you initiate proceedings isn't
24 going to change that. You have to actually get the
25 bankruptcy court to lift the stay as it pertains to

1 this litigation.

2 MS. LUKASIEWICZ: Yes, your Honor.

3 THE COURT: Okay. Anything else?

4 MR. GERSHENGORN: Nothing from the
5 defendants, your Honor.

6 MS. LUKASIEWICZ: Is there anything
7 further we need to do? We still have our sanctions
8 motion pending obviously against not just every
9 defendant.

10 THE COURT: What I think -- there's
11 nothing to do on that because --

12 MS. LUKASIEWICZ: We just -- obviously, if
13 we are able to move it forward and have a
14 scheduling order, that would be the best. I mean,
15 I think it's -- it's been pending a few months at
16 this point. So I think even defense counsel
17 represented in their reply that they don't deny
18 that jurisdiction at least for them would be --

19 THE COURT: Okay. Let's do this. Today
20 is the 19th, right, of October.

21 Mr. Gershengorn, if you were going to make a
22 motion for stay on behalf of the individual
23 defendants, you should do that by no later than
24 November 9th. If no motion for a stay has been
25 filed by November 9th, then what I would expect is

1 that I would issue probably a new scheduling order,
2 and if for some reason, Mr. Gershengorn, you decide
3 that, you know, you're not going to make a motion
4 for a stay, you know, one of the things that I
5 thought about is I encourage you, if there's any
6 margin in doing this, to talking about, you know,
7 what -- how can this case move forward in an
8 efficient way without being bogged down and one
9 motion after another motion after another motion
10 that's ultimately going to be time intensive and
11 expensive.

12 Last time I checked in, there was still a lot
13 of discovery that needed to take place. Maybe you
14 guys can come up with a plan for proceeding
15 forward, this is what you're going to do over the
16 next three months, and we may have an answer -- I
17 mean, we may -- the company -- the bankruptcy
18 proceedings may be over at the end of November. I
19 don't know how realistic that is, but I don't do
20 bankruptcy work, so I don't know. They move pretty
21 quickly I think. And, you know, we can see what
22 position we're in then. So it may be that, you
23 know, if you -- if you all could agree there's some
24 things that need to be done and we can, you know,
25 and we can do them efficiently and without disputes

1 and conflicts. And, you know, we don't have to map
2 out from here until the end of the case, because
3 some things are going to happen and we're going --
4 you know, we're going to know what the lay of the
5 land looks like a little better six months from
6 now. But let's agree to a plan for the first --
7 I'm open to that. If not, then I'll have to make
8 decisions on these issues as they arise. Okay?

9 MS. LUKASIEWICZ: Yes, your Honor.

10 THE COURT: Okay.

11 MR. GERSHENGORN: The only question I had,
12 your Honor, is I understand the Court's ruling
13 determination on the legal conflict issue as it's
14 presently before the Court. In regards to the fact
15 that the firm is not being paid currently for the
16 individual defendants' representation, is that
17 something that the Court would take into
18 consideration down the road?

19 THE COURT: Okay. I am denying that
20 application today. But I am -- I am doing so with
21 the understanding that, you know, six months from
22 now, or, you know, whenever you think that you are
23 justified in coming back and saying our situation
24 is really materially different than it was when you
25 saw me in October, you're free to do that, and, you

1 know, I will take another look at it.

2 MR. GERSHENGORN: Thank you, your Honor.

3 THE COURT: Okay. All right. Anything
4 else?

5 MS. LUKASIEWICZ: Nothing further.

6 MR. GERSHENGORN: Nothing further.

7 THE COURT: Miss Osipoff, you may have
8 your chance yet.

9 MR. GERSHENGORN: Thank you, your Honor.

10 THE COURT: All right. Have a nice day.

11 * * * * *

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATION
2
3

4 I certify that the foregoing is a
5 correct transcription, to the best of my
6 ability, from the electronic sound recording
7 of the proceedings in this matter.
8
9

10 s/Michelle L. McLaughlin
11 Michelle L. McLaughlin, RPR
12 Court Reporter
13
14
15
16
17
18
19
20
21
22
23
24
25